Filed 4/9/12 P. v. Cruz CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. GEORGE PHILLIP CRUZ, Defendant and Appellant.	C065149 (Super. Ct. No. 09F07096)

Defendant George Phillip Cruz appeals from his conviction on eight counts of oral copulation or sexual penetration with a child 10 years of age or younger. (Pen. Code, § 288.7, subd. (b).) He claims (1) his pretrial confession to the crimes was unlawfully extracted prior to receiving a *Miranda* warning;[1] (2) his confession was unlawfully coerced from him; (3) his total state prison sentence of 120 years to life is cruel and unusual punishment; and (4) the trial court wrongfully imposed a court facility fee under Government Code section 70373 on six of

---

[1] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

his counts because he committed those crimes before that statute became effective.

Defendant has forfeited his challenges to the use of his confession. He admits he made no motion at trial to exclude his confession on any ground. A failure to challenge an alleged *Miranda* violation and the voluntariness of a confession at trial forfeits the claims on appeal. (*People v. Williams* (2010) 49 Cal.4th 405, 435; *People v. Peters* (1972) 23 Cal.App.3d 522, 529-530.)

Defendant has also forfeited his constitutional attack on the severity of his sentence. Although defense counsel asked the trial court to exercise its discretion to run some of the counts concurrently, he did not object to the sentence as being cruel and unusual. A claim of cruel and unusual punishment must be raised at trial or else it is forfeited on appeal. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229.)

To overcome these forfeitures, defendant argues he suffered ineffective assistance of counsel when his attorney failed to object to his confession's introduction on the basis of *Miranda* and voluntariness, and to his sentence as cruel and unusual punishment. We conclude defense counsel did not render ineffective assistance. We also conclude the trial court properly imposed the court facility fee on all counts. We affirm the judgment.

FACTS

In August 2009, eight-year-old K., the daughter of defendant's girlfriend, told her older sister defendant had been

molesting her. At trial, K. testified that from the time she was five years old, defendant on more than 50 occasions placed his penis in her mouth, inserted his finger in her vagina, placed his penis on her vagina, touched her bottom, and had her touch his penis. On occasion, defendant would wipe ejaculate off his penis and put it inside K.'s mouth.

Approximately one month after K. confided in her sister, defendant agreed to meet with Detective John Linke of the Sacramento Sheriff's Department. He drove himself to the sheriff's station. The interview took place in an interview room containing two chairs and a table. The door was closed and unlocked during the interview. Defendant was not restrained during the interview. Detective Linke informed defendant several times he was not under arrest and was free to leave. We explain the circumstances surrounding the interview in greater detail below.

During the interview, defendant admitted he had touched K.'s bare vagina maybe 30 times, masturbated in front of K. at least 50 times, placed his penis in K.'s mouth about three times, and placed the tip of his penis against the outside of K.'s vagina less than 30 times. Defendant denied ever ejaculating in front of K. or placing ejaculate in her mouth.

After defendant confessed to these acts, Detective Linke gave him his *Miranda* rights. The interview continued, and defendant provided more details of his actions. After the interview, defendant was arrested and booked into jail.

The following day, K.'s mother, G., visited defendant at the Sacramento County Jail. Their conversation was recorded. During the conversation, defendant admitted he began "hurting" K. when she was three years old. He told G. he did what "it said in the paper." He did it in the living room, in the back of the house, and in the bedroom. G. was shopping or sleeping during those times. K. said nothing when defendant did anything to her.

Defendant also told G. that during his interview with Detective Linke, "[Linke] said, you're not under arrest. Y -- You can leave at anytime. And I -- and at one point I was gettin ready to leave and I -- I just said, fuck it. Let's do this. Told em what he needed to know."

DISCUSSION

I

Failure to Object Based on Miranda

Defendant claims his trial counsel rendered ineffective assistance when he did not object to the introduction of his confession to Detective Linke on the basis of *Miranda*. We conclude defendant did not suffer ineffective assistance as there was no *Miranda* violation to which counsel could object. Defendant was not in custody at the time he confessed to Detective Linke and thus was not entitled to *Miranda* warnings.

A. *Additional background information*

Detective Linke first spoke with defendant by telephone on September 8, 2009. Defendant stated he was willing to come in and speak with Linke. He wanted to clear his name. In a phone

conversation on September 16, 2009, defendant agreed to meet with Linke the following day. On September 17, 2009, defendant arrived at the sheriff's station before Linke did at 6:52 a.m.

Detective Linke escorted defendant into an interview room. The room contained a table and two chairs. There were restraints in the room, but Linke apologized for them being there and said he would not be using them. Defendant was not restrained or handcuffed during the interview. Linke was in plain clothes and was not carrying a weapon. He sat away from the room's door, giving defendant unobstructed access to leave.

Linke told defendant he was not under arrest. Defendant understood he was not under arrest. Linke then asked defendant if he could keep the door closed. He did not want the two of them to be disturbed by others walking by. Defendant said that was fine.

Detective Linke next explained that because defendant was not under arrest, he was free to leave at any time. The conversation went as follows:

"DET. LINKE: . . . And another thing, knowing, um, understanding you're not under arrest, you came down here on your own free will, right?

"[DEFENDANT]: Yeah.

"DET. LINKE: Okay. The one thing I wanna make sure you understand is that at any time we're talking, if you don't wanna talk to me anymore about this, just say John, I'm done. You don't even have to say you're done. You can just absolutely

walk out. Walk right out the front door. It's entirely up to you. Does that make sense?

"[DEFENDANT]: Yeah.

"DET. LINKE: That's how open I want this to be. I want you and I to sit here, discuss a little bit about the different things that, uh, have or have not been going on, whatever, and um -- but at any point you don't wanna talk anymore, you can go.

"[DEFENDANT]: Okay.

"DET. LINKE: I'll walk you to the door."

The interview lasted about three hours. During the first half, Detective Linke and defendant discussed basic information. Linke wanted to learn more about defendant and his family.

During the interview's second half, Detective Linke took a more direct approach. He explained that K. had spoken not only with a patrolman, but also with a forensic specialist trained in interviewing children. Linke said he had gone over K.'s statements to the specialist, and he told defendant, "[K.'s] not lying. She's not lying. Some things did happen to her. And there's some things you did to her. I know that. I know what happened . . . ." Linke told defendant he knew what had happened in the case but was more interested in learning why it had happened.

Detective Linke told defendant his impression was that "you figured it would be okay to come in here and just deny, deny, deny. That can't happen because it's not the truth . . . . What's important is I found out the truth on why. Alright? She went into very, very great detail about things. Very great

detail. Nothing has changed between you and I as we sit [here]. And, I wanna get into some more detail about why -- specifically why. What was going through your mind that resulted in this happening?"

Linke asked defendant why he molested K. Defendant initially denied molesting her. Linke kept pressing the issue: "I know what happened and I know what you did to her. I want to know why. You -- you can't sit and just hold it at that saying, no, nothing happened. I know it happened . . . . I know it. There isn't a doubt in my mind. And there isn't a doubt in your mind. Because you know what happened. . . . Eight-year-olds don't fabricate. They wouldn't even know how to fabricate. They wouldn't even know how to start to come up with things like this. . . . Eight-year-olds . . . cannot do that unless they lived it."

At this point, defendant asked to leave and go to work, but then he confessed. The conversation went as follows:

"DET. LINKE: You got to be honest with me. You have to be honest with me . . . , we're past the what happened. I know what you did to her. I know what is what. You got to get past that. Why K.? Why? Why her?

"[DEFENDANT]: Can I go to work now?

"DET. LINKE: You want to go to work now?

"[DEFENDANT]: Yeah.

"DET. LINKE: Yeah, you can go to work now."

The video recording of the interview depicts that after telling defendant he could go to work, Detective Linke stopped

talking, and there was a long pause. Defendant did not get up to leave. Then Linke continued speaking: "One thing I do is reverse roles and try to put myself if I was in your position, okay? Remember like I told you when we first sat down here? Here's the door. You can go out this door, you can go out that door, make a left there's the front door. Go right now if you want to. Go. . . ." As he said this, Linke gestured towards the door with his hand.

Linke continued speaking: "I'm telling you, I'm not forcing you to stay here. You have to find it in your heart to finally put this behind you. If you want to finally put this behind you. You're walking out of here regardless of what you tell me. You say you want to go to work, go to work. You're going to work regardless. You need to put this behind you. You need to be honest with me. That's my opinion. You need to be honest and put it behind you. . . ." At this point, Linke stopped speaking and there was another pause. Again defendant did not get up to leave.

Detective Linke then continued: "I told you I don't have tricks. I've been doing this job way too long to sit here with tricks and BS you and you know. If you've got a doubt in your mind whether or not, you know to tell me the truth and think, I bet you if I tell him the truth I'm going to jail right now. I'm out of here. I'm not going to go to work. It's not going to happen. You're going to work here. It's very obvious to me . . . you've got a lot on your mind. You've got a lot to tell me I know that.

"[DEFENDANT]: If I stay here, will I go to jail?

"DET. LINKE: You're not going to jail. You're leaving just like you got here.

"[DEFENDANT]: I'd rather go to jail.

"DET. LINKE: You'd rather go to jail? Would you? Why would you rather go to jail?

"[DEFENDANT]: Because of all that. And whatever she says is true.

"DET. LINK: It is true?

"[DEFENDANT]: Why? Because I hate that little girl."

Defendant then went on to confess molesting K. numerous times. He stated K. was the person who initiated the sexual contact, often after not getting her way and having a temper tantrum. Defendant allowed the contact to continue because it calmed her down. Defendant did not ever tell G., K.'s mother, that K. was initiating sexual contact with him.

Based on what K. had told investigators, Detective Linke asked defendant whether he had committed certain kinds of sexual acts with K. Responding to these questions, defendant admitted touching K.'s bare vagina "[m]aybe 30" times, masturbating in front of her or by her at least 50 times, being orally copulated by her "maybe three times," and touching her vagina with the tip of his penis "under 30 times." Defendant denied ever ejaculating in front of K. or placing ejaculate in her mouth.

Detective Linke left the room for a short while, returned, and took up defendant's statement that he wanted to go to jail. Linke asked defendant why he thought he needed to go to jail.

Defendant said, "Well, when you said -- what got me was when you said to put everything [behind you] . . . . I mean, I know, you're a human lie detector. Did I think I was going to try to fool you?. . . . No. . . . When you started saying all that stuff . . . . I said it was just a matter of time."

Linke acknowledged defendant had "dumped everything out," that "these are a lot of things that obviously I know you're not proud of. I know that. I know that if you could turn the hands of time back, you would. But we can't. We are where we are." Linke said that thinking about what defendant had told him made him want to talk more about defendant's comment of wanting to go to jail. This led Linke into giving defendant his *Miranda* rights. The conversation went as follows:

"DET. LINKE: . . . You just laid a lot on the line where you're telling me you think it's better that you go to jail and not to work. Here me out, okay. Because of that I want to advise you of something else. Because it's already been put out there but I want to make sure that we understand some of the things as well, okay. And hear me out. You've probably heard this, have you ever heard of people being advised of their rights?

"[DEFENDANT]: Right.

"DET. LINKE: Have you ever heard of that? And you've seen it on TV and all that. I want to do that so you understand perfectly clear.

"[DEFENDANT]: Oh, I know you were supposed to do that.

"DET. LINKE: No, I mean I want to now, um because of some things have come out; your [*sic*] saying now I feel, it seems like your [*sic*] depressed now that it is out.

"[DEFENDANT]: Oh, I see what you're saying.

"DET. LINKE: Alright. So hear me out and then tell me -- and this -- and what I like to do is give me a straight yes and no if you understand or not, okay? Um, you have the right to remain silent. Do you understand?

"[DEFENDANT]: Right.

"DET. LINKE: Yes or no?

"[DEFENDANT]: Yes.

"DET. LINKE: Okay. Anything you say may be used against you in court. You understand? Yes or no?

"[DEFENDANT]: Oh, yes.

"DET. LINKE: You have the right to the presence of an attorney before and during any questioning? Do you understand?

"[DEFENDANT]: Yes.

"DET. LINKE: If you cannot afford an attorney one will be appointed for you free of charge before any questioning if you want. Do you understand that?

"[DEFENDANT]: Yes.

"DET. LINKE: Okay. Now as I was going back to you making the comment . . . ."

The interview resumed, and Detective Linke went back over the questions he had previously asked defendant with specificity, and defendant again explained the extent of his molestations of K. Linke then arrested defendant, allowed him

to smoke a cigarette, and booked him into the Sacramento County Jail.

The video recording of defendant's interview with Detective Linke was played to the jury without objection.

B. *Analysis*

Defendant argues his trial counsel was constitutionally ineffective for not objecting to the introduction of his confession on the grounds of *Miranda*. He asserts he was in custody at the time he made his confession and should have received a *Miranda* warning at the beginning of his interview with Detective Linke. He claims counsel's failure to object under *Miranda* was deficient, and the deficient performance was prejudicial. We disagree.

To prevail on a claim of ineffective assistance of counsel, defendant must show counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 684, 686-689 [80 L.Ed.2d 674, 691, 692-693].)

Counsel's performance was not deficient. There was no basis for him to object under *Miranda* to admitting defendant's confession because *Miranda* did not apply. The *Miranda* rule, requiring the interrogating officer to inform the suspect of his constitutional rights before questioning begins, applies only

while the suspect is in police custody. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 439-440 [82 L.Ed.2d 317, 334-335].)

For purposes of *Miranda*, "custody" means the subject has been formally arrested, or is subject to a restraint on freedom of movement of the degree associated with a formal arrest. (*Thompson v. Keohane* (1995) 516 U.S. 99, 112 [133 L.Ed.2d 383, 394].) When no formal arrest takes place, the relevant inquiry is whether a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. (*Ibid.*)

When inquiring whether a reasonable person in defendant's situation would have felt free to leave, we must consider the totality of the circumstances surrounding the incident. (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403.) "Although no one factor is controlling, the following circumstances should be considered: '(1) [W]hether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of the questioning.' (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1753.) Additional factors are whether the suspect agreed to the interview and was informed he or she could terminate the questioning, whether police informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect's freedom of movement during the interview, and whether police officers dominated and controlled the interrogation or were 'aggressive, confrontational, and/or accusatory,' whether they pressured the suspect, and whether the

suspect was arrested at the conclusion of the interview. [Citation.]" (*People v. Pilster, supra,* 138 Cal.App.4th at pp. 1403-1404.)

Here, the totality of the circumstances indicated defendant was not in custody for purposes of *Miranda* when he made his confession to Detective Linke. Defendant voluntarily met with Linke and transported himself to the sheriff's station. He met only with Detective Linke. Linke was in plain clothes and was not armed. He sat away from the door, giving defendant access to leave. He asked defendant if he could close the door to prevent disruption by others.

Detective Linke made it very clear defendant was not under arrest and could leave at any time. Linke told defendant he could end the interview, leave, and go back to work when he wanted, and Linke even offered to walk defendant to the door. Linke placed no restrictions on defendant's freedom of movement during the interview.

Detective Linke was not domineering or confrontational in the interview. He did inform defendant he believed K.'s accusations and only wanted to know why defendant had molested her. When defendant asked to leave, however, Linke stopped the interview and gave defendant time to get up and leave. Linke again told defendant he could leave, and in fact told him specifically how to leave the room, make his way down a hall, and find the building's exit. When defendant did not leave, Linke attempted to persuade defendant to continue talking, but he did not prevent defendant from leaving. Under these

circumstances, a reasonable person would have felt free to leave the interview room.

Because defendant was not in custody for purposes of *Miranda*, he was not entitled to a *Miranda* warning prior to his first confession, and his trial counsel was not deficient for not objecting to defendant's confession on the basis of *Miranda*.[2]

II

Failure to Object Based on Voluntariness of the Confession

Defendant claims his confession was not voluntary, and he argues his trial counsel rendered ineffective assistance when he failed to object to the confession's use on that basis. We disagree, as defendant gave his confession voluntarily. Counsel was not deficient for not objecting to a voluntary confession.

Involuntary confessions are inadmissible at trial. (*Lego v. Twomey* (1972) 404 U.S. 477, 483 [30 L.Ed.2d 618, 623-624].) "In determining whether a confession was voluntary, '"[t]he question is whether defendant's choice to confess was not 'essentially free' because his [or her] will was overborne."' [Citation.] Whether the confession was voluntary depends upon

---

[2] After claiming he was in custody for purposes of *Miranda*, defendant argues the *Miranda* warning he eventually received was ineffective because it was deliberately delayed and did not make clear he could still exercise his constitutional rights. (See *Missouri v. Seibert* (2004) 542 U.S. 600, 613-614 [159 L.Ed.2d 643, 655-656]; *Thompson v. Runnels* (9th Cir. 2011) 657 F.3d 784.) This argument is moot because defendant was not in custody. In the cases cited by defendant, unlike here, the defendants were in custody for purposes of *Miranda* at the time each first confessed.

the totality of the circumstances. [Citations.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 169.)

"In evaluating the voluntariness of a statement, no single factor is dispositive. [Citation.] The question is whether the statement is the product of an '"essentially free and unconstrained choice"' or whether the defendant's '"will has been overborne and his capacity for self-determination critically impaired"' by coercion. [Citation.] Relevant considerations are '"the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity" as well as "the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health."' [Citation.]" (*People v. Williams, supra,* 49 Cal.4th at p. 436.)

The totality of the circumstances surrounding defendant's confession, and the confession itself, demonstrate the confession was voluntary. It was the product of a free and unrestrained choice by defendant. His will to choose to confess was not overborne by any degree of coercion.

The confession was not the result of police coercion. The record is devoid of any suggestion that Detective Linke resorted to physical or psychological pressure to elicit defendant's confession. Defendant agreed to meet with Linke and drove himself to the station. He was seated in a standard interview room with unobstructed access to the door. Linke was in plain clothes and was unarmed. Linke informed defendant repeatedly he was not under arrest and was free to end the interview and leave

any time he wanted. At one point, Linke offered to walk defendant out of the building. At another point, he instructed defendant on how to leave the building. He also stopped the interview and gave defendant time to leave when defendant asked to leave.

Detective Linke conducted the interview in a professional and respectful manner. He did not threaten defendant or in any way make defendant feel fearful. Indeed, his questioning methods were intended not to generate fear. He tried to make defendant feel comfortable and at ease in talking about very serious allegations.

The interview was not long. The first half of the three-hour interview was spent discussing defendant, his background, and his family situation. It was about 90 minutes into the interview when Detective Linke began asking more direct questions and defendant eventually confessed and began to explain his actions.

Defendant's maturity, education, and health did not make him susceptible to coercive interview techniques. At the time of the interview, defendant was 43 years old. He had served four years in the army from 1987 until 1991 working in finance. He had worked for 14 years for Verizon Wireless, the last nine years in a Folsom location working with accounts receivable. There was no evidence of any physical or mental disability that could affect his ability to choose to confess. Under these circumstances, we easily conclude defendant's confession was voluntary.

Defendant, however, points to two interview methods used by Detective Linke to assert his confession was involuntary: Linke's promise that defendant would not be arrested, was free to leave, and would go to work and not to jail that day no matter what he said; and Linke's use of facts derived from K.'s statements to ask defendant whether he had engaged in specific types and quantities of sexual contact. Neither method is evidence of police coercion.

Defendant claims Linke's statements that he was free to leave, would not go to jail, and could go to work were implied and improper suggestions of lenity to induce defendant to confess. They were not. To the contrary, the statements allowed defendant to say or not say whatever he wanted to say with neither a promise nor a threat of what could happen if defendant did or did not confess.

Linke testified at trial that as the interview began, he fully expected defendant to leave after talking with him. However, defendant opened the door for not leaving when he said he thought he should go to jail after Linke invited him to leave. Moreover, defendant understood he was free to leave and, more importantly, recognized his subsequent confession was voluntary and *not* made in response to Linke's offer to leave. Defendant acknowledged this in his jailhouse conversation with G.:

"[DEFENDANT]: Oh, I, he, he was sayin, uh, something about friendships, and then it just got to me. And I said, can I

leave now, and he says, yeah. And I sat there, and I said, you know what, fuck it, I said I'd rather go to jail.

"[G.]: They were gonna let you leave?

"[DEFENDANT]: Yeah. [¶] . . . [¶]

"[G.]: But if the detective was going to let you go, why didn't you go?

"[DEFENDANT]: No -- I owe you this much."

This evidence demonstrates defendant's decision to confess was his own. He was under no pressure to say anything and was free to leave, yet he chose to stay and confess of his own will.

In an odd twist, defendant also faults Detective Linke's use of facts in his questions. This method, however, was not coercive and had no effect on defendant's will to choose to confess. The method was not deceptive because Linke was basing his questions on what K. had told authorities and was asking defendant whether he had committed certain sexual acts with her. Since the law allows a peace officer to use deceptive stratagems to obtain a confession so long as they are not likely to produce a false confession (*People v. Mays* (2009) 174 Cal.App.4th 156, 165), there can be no doubt that the law allowed Detective Linke to question honestly defendant based solely on the evidence obtained in the investigation up to that point. Such an interview method is neither deceitful nor likely to produce a false or unreliable confession.

Because defendant's confession was voluntary, he suffered no ineffective assistance when his trial counsel did not object

to the confession as involuntary. Trial counsel was not deficient for not making an unsupported objection.[3]

III

Failure to Object to Sentence as Cruel and Unusual Punishment

Defendant faults his trial attorney for not objecting to his sentence as cruel and/or unusual punishment in violation of the federal and state constitutions. The trial court sentenced defendant to eight prison terms of 15 years to life with each term to be served consecutively. Defendant alleges counsel was deficient for not objecting because the punishment, effectively 120 years to life, was grossly disproportionate to the crimes. He claims an objection would likely have resulted in a more favorable sentence.

"A defendant has a considerable burden to overcome when he challenges a penalty as cruel or unusual. The doctrine of separation of powers is firmly entrenched in the law of California and the court should not lightly encroach on matters which are uniquely in the domain of the Legislature." (*People* v. *Bestelmeyer* (1985) 166 Cal.App.3d 520, 529.) We find defendant is unable to meet this burden and, because his sentence withstands constitutional scrutiny, is unable to establish ineffective assistance of counsel.

---

[3] Because we conclude his confession was voluntary, defendant's subsequent argument that the jailhouse confession was the product of a coerced confession is moot.

The California Constitution's prohibition of cruel or unusual punishment prohibits imposing a criminal sentence which is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted; see also *People v. Dillon* (1983) 34 Cal.3d 441, 478; Cal. Const., art. I, § 17.)

The federal Constitution's Eighth Amendment prohibits cruel and unusual punishment; that is, punishment which involves "unnecessary and wanton infliction of pain" or is "grossly out of proportion to the severity of the crime." (*Gregg v. Georgia* (1976) 428 U.S. 153, 173 [49 L.Ed.2d 859, 875]; see also *Ewing v. California* (2003) 538 U.S. 11, 23 [155 L.Ed.2d 108, 119].)

We use a three-pronged approach to determine whether a particular sentence is grossly disproportionate. First, we review "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*In re Lynch, supra,* 8 Cal.3d at p. 425.) Second, we compare the challenged punishment with punishments prescribed for more serious crimes in our jurisdiction. (*Id.* at p. 426.) Third, we compare the challenged punishment to punishments for the same offense in other jurisdictions. (*Id.* at p. 427; see also *Ewing v. California, supra*, 538 U.S. at p. 22.) The importance of each of these prongs depends upon the facts of each specific case. (*In re Debeque* (1989) 212 Cal.App.3d 241, 249.) Indeed, we may base our decision on the first prong

alone. (*People v. Dillon*, *supra*, 34 Cal.3d at pp. 479, 482-488.)

Our review of the first prong, the nature of defendant and his crimes, leads us to conclude defendant is a danger to society and his punishment is not grossly disproportionate. Defendant acknowledges his crimes, violations of Penal Code section 288.7, subdivision (b), are statutorily designated as serious felonies. (Pen. Code, § 1192.7, subd. (c)(1).) They were serious sexual offenses involving penetration and oral copulation of a child. The victim testified that on more than one occasion, defendant wiped the ejaculate off of his penis and put the ejaculate into her mouth. Defendant, who was over 40 years of age, committed his crimes on numerous occasions over a three-year period beginning when the victim was only five years old.

Moreover, although he was not related to the victim, defendant was acting out of a position of trust. During the recorded jailhouse conversation, the victim's mother told defendant he was "the only father [K.] knew. . . . You're the only one she knew. She trusted you. . . ."

In addition, defendant blames the victim for his actions. In his interview with Detective Linke, defendant blamed the victim for initiating the sexual contact, and he would allow it to calm her down. Yet he never told the victim's mother the victim was acting in such a completely inappropriate way. Perhaps that is because defendant, according to his jailhouse confession to the victim's mother, said it was he who began

"hurting" the victim, and did so when she was *three* years old. All of these facts expose the seriousness of defendant's crimes and the danger he is to society.

Defendant attempts to lessen the seriousness of his actions by arguing he has no prior record and no history of psychotic disorder or substance abuse. He also claims he inflicted no violence or harm on the victim. These points do not outweigh the seriousness of defendant's actions. Moreover, at trial, the victim testified there had in fact been violence. K. stated when she got in trouble, defendant would throw things at her or hit her. He hit her with a belt or his shoe, or with a bean bag chair that would cause her to hit a wall hard. On one occasion, defendant pushed her to the ground and hit her in the mouth and bottom with a shoe she wore to church. The strike left a large bruise on her bottom. Defendant's lack of a criminal record or history of substance abuse do not overcome these facts of present danger.

The second prong for determining whether a sentence is grossly disproportionate asks us to review the severity of defendant's sentence with punishments imposed in California for more serious crimes. Defendant argues his sentence is grossly disproportionate because it equates with the punishment imposed for a special-circumstance first degree murder, life without the possibility of parole. This argument, however, ignores that defendant's punishment consists of multiple punishments imposed for multiple serious crimes.

The Legislature declared that a single violation of Penal Code section 288.7, subdivision (b), is punishable by imprisonment in the state prison for a term of 15 years to life. The Legislature thus recognized a difference in severity between one count of first degree murder and one violation of Penal Code section 288.7. However, defendant committed multiple, separate violations of Penal Code section 288.7 over a three-year period, each violation earning him a prison term of 15 years to life. That those terms add up to many, many years, and effectively become a life term, does not demonstrate the full term is grossly disproportionate to the crimes.

Defendant does not address the third prong of the cruel and unusual punishment test, comparison with sentences imposed for similar crimes in other jurisdictions. Instead, he argues any sentence which is humanly impossible to be completed during a lifetime is grossly disproportionate. We have previously rejected this argument and reject it again here. (*People v. Retanan* (2007) 154 Cal.App.4th 1219, 1230-1231.)

From all of this, we conclude defendant's sentence is not constitutionally disproportionate to his crimes. His crimes and the circumstances surrounding them are extremely serious and show defendant remains a danger to society. In addition, multiple indeterminate consecutive life sentences that effectively result in a life sentence without parole do not by that fact demonstrate the total sentence is grossly disproportionate.

Because defendant's sentence was not cruel and unusual punishment, we conclude defendant did not suffer ineffective assistance of counsel when his trial attorney did not object to the sentence on that basis. Counsel was not deficient for not making an unsubstantiated objection.

IV

Court Facility Fee

Defendant asserts the trial court improperly imposed a court facility fee under Government Code section 70373 on six of his eight counts. Defendant claims imposing the fee violated constitutional proscriptions against ex post facto laws because Government Code section 70373 is not retroactive and was adopted after those six crimes had been committed.

We previously held Government Code section 70373 is retroactive and applies to all convictions that occur after the statute's effective date. (*People v. Fleury* (2010) 182 Cal.App.4th 1486, 1489-1495; *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1413-1414.) We decline defendant's request that we reconsider our holding.

Because all of his convictions occurred after Government Code section 70373 became effective, each count was subject to that statute and the trial court did not err by imposing the fee.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

RAYE, P. J.

HULL, J.